Supreme Court, U.S.
FILED
MAR 16 1992
OFFICE OF THE CLERK

No. 91-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT E. COOPER*
J. EDD STEPP, JR.
STEVEN C. MCCRACKEN
MARK E. WEBER
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

Attorneys for Respondent
AMERICAN AIRLINES, INC.

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

This case involves the application of Section 2 of the Sherman Act, 15 U.S.C. §2, to the unilateral activity of a firm possessing *lawfully* acquired and maintained monopoly power in one market that allegedly gave that firm some competitive advantage, although not a monopoly or a threatened monopoly, in a second market. Respondent American Airlines, Inc. respectfully disagrees with Petitioner's statement of the questions presented by the application of Section 2 in such circumstances. Moreover, Petitioner fails to alert the Court to the fact that the undisputed material facts established in the trial court would preclude a finding for Petitioner even on the strained reading of Section 2 that Petitioner offers. Thus, Respondent would state the questions presented by this case as follows:

(1) Under this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), does a firm violate Section 2 of the Sherman Act if it allegedly uses a *lawfully* acquired and maintained "essential facility" or *lawfully* acquired and maintained monopoly power in one market to gain a competitive advantage in a second market, when the firm does not monopolize or attempt to monopolize the second market?

(2) Even if Section 2 could be violated without any showing of either actual or attempted monopolization, did the undisputed material facts support the entry of summary judgment in favor of Respondent because of Petitioner's failure to raise any triable issue with respect to the elements of Petitioner's "essential facility" and monopoly leveraging claims?

THE PARTIES TO THIS PROCEEDING

The caption of the case in this Court contains the names of all parties. American Airlines, Inc. is a wholly owned subsidiary of AMR Corporation.

The following are also subsidiaries or affiliates of AMR Corporation:

Air Services, Inc.
American Airlines Decision Technologies, Inc.
AA Capital
AMR Capital Corporation
AMR Commuter Finance,Inc.
AMR Commuter Finance II, Inc.
AMR Eagle, Inc.
AMR Information Services, Inc.
AMR Insurance Ltd. (Bermuda)
AMR Investment Services, Inc.
AMR Leasing Corporation
AMR Properties, Inc.
AMR Services Corporation
Avenue H Properties, Inc. (Texas)
Blue Sky Number One, Inc.
D/FW Terminal Corporation (49%)(Texas)
AMR/American Airlines Foundation (Texas)

The following are subsidiaries of American Airlines, Inc.:

AA Credit Corporation
AA Ventures I, Inc.
Admirals Club, Inc. (Mass.)
Air California, Inc.
AirCal, Inc.
Air Data Center, Inc.
American Airlines Australian Tours, Inc.
American Airlines de Italy, Inc.
American Airlines de Mexico, S.A. (Mexico)
American Airlines de Venezuela, S.A. (Venezuela)
American Airlines Fuel Corporation
American Airlines Overseas Finance, N.V. (Netherlands Antilles)

American Inter-Island, Inc.
AMR Ventures I, Inc.
AMR Ventures II, Inc.
AMR Ventures III, Inc.
AMR Ventures IV, Inc. (Nevada)
AMR Ventures Holding Company, Inc.
Flagship Hotels, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
THE PARTIES TO THIS PROCEEDING	ii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE DECISION BELOW IS COMPELLED BY THIS COURT'S OPINION IN *COPPERWELD*, AND IS CONSISTENT WITH ALL OTHER DECISIONS OF THIS COURT	9
A. TO THE EXTENT THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING THE MONOPOLY LEVERAGING THEORY, THE VIEW OF THE NINTH CIRCUIT IS CORRECT AND REPRESENTS THE TREND AMONG THE CIRCUITS AFTER *COPPERWELD*	13
B. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE "ESSENTIAL FACILITY" DOCTRINE, AND THE VIEW OF THE NINTH CIRCUIT IS CORRECT	16
II. EVEN UNDER PETITIONER'S INCORRECT INTERPRETATION OF SECTION 2, SUMMARY JUDGMENT FOR RESPONDENT WAS STILL THE APPROPRIATE OUTCOME ON THE FACTS OF THIS CASE	18

A. SUMMARY JUDGMENT FOR AMERICAN SHOULD BE AFFIRMED BECAUSE THE UNDISPUTED FACTS SHOWED THAT AMERICAN DID NOT "USE" ITS ALLEGED CRS MONOPOLY POWER IN THE AIR TRANSPORTATION MARKET, AND DID NOT GAIN ANY UNWARRANTED COMPETITIVE ADVANTAGE IN THAT MARKET 19

B. SUMMARY JUDGMENT FOR AMERICAN SHOULD BE AFFIRMED BECAUSE THE UNDISPUTED FACTS SHOWED THAT AMERICAN NEVER DENIED NORTHWEST ACCESS TO SABRE, AND THAT SUCH ACCESS WAS NOT "ESSENTIAL" 22

III. PETITIONER'S CHALLENGES ARE FACT BOUND, AND WERE NOT ASSERTED IN THE COURTS BELOW 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES:	Page(s)
Advanced Health-Care Services v. Radford Community Hospital, 910 F.2d 139, 149 n.17 (4th Cir. 1990)	14
Alaska Airlines, Inc. v. United Air Lines, Inc., 948 F.2d 536 (9th Cir. 1991)	*passim*
Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413 (1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 274 (1991)	16
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)	11
Associated Press v. United States, 326 U.S. 1 (1945)	17
Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association, 735 F.2d 577 (D.C. Cir. 1984)	14,15
Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir. 1986)	21
Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)	*passim*
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)	11
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	11
Catlin v. Washington Energy Co., 791 F.2d 1343 (9th Cir. 1986)	14,19
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	12,25
City of Chanute v. Williams Natural Gas Co., 743 F. Supp. 1437 (D.Kan. 1990), *aff'd on other grounds*, ___ F.2d ___, 1992-1 Trade Cas. (CCH) ¶ 69,703 (10th Cir. 1992)	15
Consolidated Gas Co. of Florida v. City Gas Co. of Florida, 665 F. Supp. 1493 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir. 1989)	22

Table of Authorities Continued

	Page
Continental Cablevision of Ohio, Inc. v. American Electric Power Co., 715 F.2d 1115 (6th cir. 1983)	21
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)	*passim*
Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174, 177-79 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2041 (1991)	17,22
Directory Sales Management Corp. v. Ohio Bell Telephone Co., 833 F.2d 606 (6th Ci. 1987)	17,23
EEOC v. FLRA, 476 U.S. 19 (1986)	23
Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986)	17
Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984)	11
Grason Electric Co. v. Sacramento Municipal Utility Dist., 571 F. Supp. 1504 (E.D. Cal 1983), *rev'd on other grounds*, 770 F.2d 883 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986)	15
H.L. Hayden Co. v. Siemens Medical Systems, Inc., 672 F. Supp. 724 (S.D.N.Y. 1987), *aff'd*, 879 F.2d 1005 (2d Cir. 1989)	12
Hecht v. Pro-Football Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978)	17
In re Air Passenger Computer Reservations Systems Antitrust Litigation, 694 F. Supp. 1443 (C.D. Cal. 1988), *aff'd sub nom. Alaska Airlines, Inc. v. United Air Lines, Inc.*, 948 F.2d 536 (9th Cir. 1991)	*passim*
International Distribution Centers, Inc. v. Walsh Trucking Co., Inc., 812 F.2d 786 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987)	12

Table of Authorities Continued

Page

Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub nom. G.K.C. Michigan Theatres, Inc. v. National Amusements, Inc.*, 490 U.S. 1087 (1989) 15

Key Enterprises of Delaware, Inc. v. Venice Hospital, 919 F.2d 1550 (11th Cir. 1990) 14

Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir.), *cert. denied*, 455 U.S. 921 (1981) 12

M&M Medical Supplies & Service v. Pleasant Valley Hospital, 738 F.Supp 1017 (S.D.W.Va. 1990) 15

MCI Communications Co. v. AT&T, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) .. 18

Oahu Gas Service, Inc. v. Pacific Resources, Inc., 829 F.2d 1471 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 180 (1988) 20

Olympia Equipment Leasing v. Western Union Telegraph Co., 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987) 11,18

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 13

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 19

Richter Concrete Corp. v. Hill-Top Concrete Corp., 691 F.2d 818 (6th Cir. 1982) 12

Steagald v. United States, 451 U.S. 204 (1981) 24

Syufy Enterprises v. American Multicinema, 793 F.2d 990 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) 14

Twin Laboratories, Inc. v. Wieder Health & Fitness, 900 F.2d 566 (2d Cir. 1990) 15,17,21

United States v. Griffith, 334 U.S. 100 (1948) 12,13

United States v. Johnston, 268 U.S. 220 (1925) 23

United States v. Terminal Railroad Association, 224 U.S. 383 (1912) 16

Table of Authorities Continued

	Page
United States v. Western Electric Co., 1990-1 Trade Cas. (CCH) ¶ 68,973 (D.C. Cir. 1990)	15
Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243 (D.C. Cir. 1987)	21
RULES AND REGULATIONS:	
14 C.F.R. § 255	2
Rule 56(c), Federal Rules of Civil Procedure	12,25
STATUTES:	
Section 1 of the Sherman Act, 15 U.S.C. § 1	9,25
Section 2 of the Sherman Act, 15 U.S.C. § 2	*passim*
Section 3 of the Clayton Act, 15 U.S.C. § 14	25
OTHER AUTHORITIES:	
Areeda, *Essential Facilities: An Epithet In Need Of Limiting Principles*, 58 ANTITRUST L.J. 841 (1990)	17
P. Areeda & H. Hovenkamp, ANTITRUST LAW (1989 Supp.)	11
III P. Areeda & D. Turner, ANTITRUST LAW (1978)	17
R. Bork, THE ANTITRUST PARADOX (1978)	14
Bowman, Jr., *Tying Arrangements and the Leveraging Problem*, 67 YALE L.J. 19 (1957)	14
Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108 (1959)	16
Markovits, *Tie-ins, Leverage, and the American Antitrust Laws*, 80 YALE L.J. 195 (1970)	14
Note, *The Legal and Regulatory Implications of Airline Computer Reservations Systems*, 103 HARV. L. REV. 1930 (1990)	17
L. Sullivan, ANTITRUST (1977)	22
R. Posner & F. Easterbrook, ANTITRUST (2d ed. 1981)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1242

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent American Airlines, Inc. ("American") respectfully submits this Brief in opposition to the Petition for a Writ of Certiorari filed by Petitioner Northwest Airlines, Inc. ("Northwest" or "Petitioner").[1]

OPINIONS BELOW

American does not disagree with the citation to the opinions below contained in the Petition.

---

[1] The Petition for a Writ of Certiorari involves two cases that were consolidated below. The first case involves Alaska Airlines, Inc. and Transtar Airlines Corporation as Petitioners, and United Air Lines, Inc., as Respondent. American is not a party to that action. The second case involves only Northwest as Petitioner and American as Respondent. American only responds to those arguments and contentions in the Petition for Certiorari that pertain to the claims asserted by Northwest against American.

STATEMENT OF JURISDICTION

American does not disagree with the statement of the basis for jurisdiction in this Court contained in the Petition.

STATUTE INVOLVED

American agrees that Section 2 of the Sherman Act, 15 U.S.C. §2, is central to the resolution of this case. Section 2 provides, in pertinent part:

> "Every person who shall monopolize, attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." 15 U.S.C. §2.

American disagrees that 14 C.F.R. §255 is at issue in this case. No claims for violation of that regulation were alleged below, and no such claims could have been alleged because the Department of Transportation has exclusive jurisdiction over the enforcement of its regulation. Moreover, this action, which was commenced only days after the effective date of the regulation, involves conduct that predated the regulation.

STATEMENT OF THE CASE

The Court has been asked by Northwest to review the Ninth Circuit's affirmance of summary judgment in favor of American on a claim that it was unlawful for American to use alleged monopoly power in the market for the provision of computerized reservation system ("CRS") services to airlines to achieve a competitive advantage in the market for air transportation.[2] However, Petitioner has

---

[2] The case also involved claims that American had unlawfully monopolized the closely related market for the provision of CRS services to travel agents. That issue was resolved at a lengthy jury trial in favor of American, and no appeal was taken by Northwest from the jury's verdict. *Alaska Airlines, supra*, 948 F.2d at 539 n.4 (Pet. App.

conceded that American obtained the alleged monopoly power in the market for providing CRS services to airlines lawfully as a result of American's innovation and business acumen, and has conceded further that American did not monopolize or attempt to monopolize the air transportation market. *Alaska Airlines, Inc. v. United Air Lines, Inc.* (hereinafter *"Alaska Airlines"*), 948 F.2d 536, 546 (9th) Cir. 1991) (Petitioner's Appendix ("Pet. App.") at 17a) ("Plaintiffs. . .concede that each defendant's control of its CRS did not create a dangerous probability that the defendants would monopolize the downstream air transportation market."). *See also* 948 F.2d at 542, 546 (Pet. App. at 10a, 18a).[3] The trial court and the Ninth Circuit, relying upon this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984), held

---

at 4a n.4). American argued (unsuccessfully) before the Ninth Circuit that the trial judgment barred relitigation of certain issues that are essential to Petitioner's "essential facility" and monopoly leveraging claims. *Id.*, 948 F.2d at 539-40 (Pet. App. at 5a-6a). American continues to believe that such a barrier exists.

[3] There is no question but that these matters were conceded below. In its brief in the Ninth Circuit, Petitioner admitted that each defendant had "acquired a lawful monopoly in the market for computerized reservation services to airlines." Appellants' Opening Brief at p. 2. *See also id.* at p. 18 ("Plaintiffs' second claim was that each defendant had lawfully acquired monopoly power in the relevant product market of CRS services provided to airlines. . . ."). Moreover, the trial court found, on the undisputed facts before it, that there was no evidence that would permit a reasonable jury to find that American had either monopolized or attempted to monopolize the air transportation market. *In re Air Passenger Computer Reservations Systems Antitrust Litigation* (*"In re CRS"*), 694 F. Supp. 1443, 1455 (C.D.Cal. 1988) (Pet. App. at 38a-39a) ("In this case there is no danger than American will monopolize the market for air transportation.") Northwest did not appeal that finding to the Ninth Circuit. Indeed, in its statement of the issues presented to the Ninth Circuit and in its argument regarding monopoly leveraging, Petitioner conceded that it was not claiming that American's conduct threatened monopolization in the downstream, air transportation market. Appellants' Opening Brief at pp. 2-3 & 32. In this Court, in its statement of the Question Presented for Review at page i, Northwest further concedes that the question presented here must assume that there is no threat of monopolization in the air transportation market ("although falling short of actual or attempted monopolization").

that the unilateral action of a firm that does not threaten monopolization does not violate Section 2 of the Sherman Act.

This case arises from the competition in the airline industry following deregulation of the industry by Congress in 1978. Prior to deregulation, the airlines had their fares, routes and services regulated by the Civil Aeronautics Board. Congress determined that regulation had stifled innovation and competition in the industry, and therefore removed the regulatory restrictions to encourage the airlines to compete and to bring about greater benefits for consumers.

American had been an innovator even during the days of regulation. American was the first airline to introduce "Super Saver" fares, thereby injecting at least some price competition into an otherwise stagnant process. In 1976 American pioneered a technological revolution in the travel industry by introducing SABRE, American's computerized reservation system or "CRS."[4] American spent over $400 million dollars on the design and operation of SABRE. Those expenditures began during a time when American was either losing money or barely breaking even on its airline operations. American's risk-taking, innovation and commitment to excellence made SABRE the premier CRS in the world, and travel agents, airlines and consumers have benefited from SABRE's technological advancements.[5] Today, all of these groups benefit from the com-

---

[4] A CRS is made up of a centrally located computerized data base that is linked by phone lines to terminals located throughout the country, and in some foreign countries. The central data base contains information about flights, fares and reservations for a year into the future for the entire industry. A travel agent can access that data from a remote terminal, select an itinerary, make a booking, and print a ticket. Similar information is available about car rentals, hotels, and other travel-related services, and similar transactions can be processed regarding those products. *Alaska Airlines, supra*, 948 F.2d at 538 (Pet. App. at 2a-3a).

[5] As American's Chairman testified: "[W]e did. . .exactly what companies are supposed to do in a free enterprise society. We figured out

puterized services provided by SABRE and the three other CRSs available in the United States.

During the time that American was investing in new CRS technology, Northwest was earning substantially higher profit margins on its airline operations than was American, and was reinvesting those profits in new aircraft or distributing the profits to its shareholders.[6] Northwest did not invest in a CRS in the early days, when the risk was great and acceptance was questionable. It was not until 1987 that Northwest purchased a part interest in an existing system, PARS, that had been developed by Trans World Airlines, Inc.

American's investment in SABRE proved to be a risk that was worth taking. SABRE has been profitable. However, it is conceded that any competitive advantage in the air transportation market gained by American as a result of its CRS was not sufficient to threaten monopolization of that market.[7] During the relevant period, American's

---

there was a need for something. . .[we] put the assets in it and created a team of people absolutely dedicated to making it the best. And the result has been that we have got a very successful system." Excerpt of Record of American Airlines, Inc. in the Ninth Circuit ("ER") at 4:73.

[6] Northwest's Annual Report in 1984 boasted that it had been profitable every year since 1950, and had paid cash dividends to shareholders for 30 consecutive years. ER at 21:221. In its 1988 Annual Report, Northwest reported record earnings and its "39th straight year of profitability." ER at 21:228. Between 1970 and 1988, while American was investing heavily in SABRE, Northwest paid out to its shareholders about $220 million in dividends. ER at 4:60.

[7] While Petitioner asserts that American gained a competitive advantage in the air transportation market from its ownership of SABRE, no evidence of any such advantage was presented to the courts below. For purposes of discussing the applicability of *Copperweld* to the "essential facility" theory and the monopoly leveraging doctrine, American presumes for purposes of argument that proof of a competitive advantage short of threatened monopolization could have been presented. However, as argued at Parts II and III, *infra*, Petitioner's failure to offer proof of any such competitive advantage provides an independent ground for denying certiorari in this case.

share of the domestic air transportation industry was never greater than 14%.

Northwest, having ignored American's labors to develop a CRS while spending its profits on other assets or distributing them to shareholders, now claims that American should be punished for its foresight, and forced to share the benefits of its investment with those who took no risks and made no investment, as if they were part owners.[8] The fact is that American has permitted Northwest and other airlines to benefit from the development of SABRE. From the day SABRE was introduced, Northwest has been a participating carrier in SABRE and its flights and fares have been listed in SABRE and available for sale by travel agents using SABRE. Northwest complains that American got a competitive advantage because, for a period of time, American's flights were given a preference in SABRE displays over the flights of others, including Northwest, and because Northwest had to pay a fee for bookings received through SABRE, while American did not pay itself a fee.[9] But American made the investment in SABRE, and took the risk. Its actions were perfectly reasonable, and had no anticompetitive effects.

The trial court (U.S. District Judge Edward Rafeedie, Central District of California) found that even if everything

---

[8] According to American's Chairman, American had to "scrape" to get the money for SABRE "while we were selling off our 747s." ER at 4:47-48. Meanwhile, Northwest was *buying* 747s and making substantial distributions to its shareholders. *See* note 6, *supra*.

[9] Northwest was a co-host in SABRE prior to November of 1984, and as such received a preference for its flights over those of non-co-hosts, including the flights of Northwest's primary competitor, United. Similarly, as a co-host, Northwest paid a booking fee that was substantially less than that paid by many other non-co-host airlines. Northwest does not complain about these instances of more favorable treatment. Moreover, Northwest's own witnesses testified that there was nothing wrong with American giving its own flights some preferential treatment in its own CRS. ER 8:130; 16:186. Northwest's witnesses also acknowledged that the booking fee that its CRS, PARS, had charged, which was the same as that charged by SABRE, was reasonable. ER 17:188.

that Northwest had alleged were true and were viewed in the light most favorable to Northwest, American's actions did not amount to a violation of Section 2. Relying upon the words of the statute and this Court's decision in *Copperweld*, the trial court noted that Section 2 prohibits unlawful monopolization or attempted monopolization.[10] The court then held that there was no violation of Section 2, whether one used the "essential facility" theory or the monopoly leveraging doctrine, because there was no evidence that would suggest that there was the required dangerous probability that American would successfully monopolize the air transportation market.[11] The Ninth Circuit affirmed in a unanimous opinion written by Judge Hall, and joined by Judges Norris and Trott.

SUMMARY OF ARGUMENT

In *Copperweld* this Court pronounced the law that applies to this case. The Court held that the conduct of a single firm is governed only by Section 2's prohibition of threatened monopolies. The Court stated:

> The conduct of a single firm is governed by Section 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a

---

[10] The statute's prohibition of conspiracies and combinations to monopolize was never at issue in this case.

[11] It is conceded by Petitioner that the fundamental issue here is the scope and application of Section 2, whether the analysis is done under the rubric of monopoly leveraging or "essential facility." Petition at p. 12. The words of the statute define a violation, and the related "doctrines" or theories used by the courts have vitality only to the extent that they are properly based upon the words of the statute—they cannot be independent grounds for imposing Section 2 liability. *See In re Air Passenger Computer Reservations Systems Antitrust Litigation* (hereinafter *"In re CRS"*), 694 F. Supp. 1443, 1455 (C.D. Cal. 1988), *aff'd*, 948 F.2d 536 (9th Cir. 1991) (Pet. App. at 37a) ("The essential facilities doctrine must be tied to the particular statutory provision under which relief is sought. The doctrine itself is an abstraction designed to assist the courts in determining whether the statute has been violated.").

> vigorous competitor may leave that impression. . . . In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

467 U.S. at 767-68 (citations and footnotes omitted). The trial court and the Ninth Circuit below followed the holding of *Copperweld*, and have done nothing inconsistent with the decisions of this Court. Thus, there is no basis for granting certiorari in this case pursuant to Rule 10.1(c) of the Rules of this Court (conflicts with prior decisions of the Supreme Court).

The decision below does conflict with the Second Circuit's thirteen-year-old, pre-*Copperweld* decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). However, it is *Berkey* that is incorrectly decided, not this case. *See* 444 U.S. at 1094 (Justices Rehnquist and Powell dissented from the denial of certiorari in *Berkey*, stating that *Berkey*'s theory is "little less than bizarre."). Moreover, *Berkey* was decided before *Copperweld*. As other Circuits focus upon the impact of *Copperweld*, they are likely to reject *Berkey* as the Ninth Circuit did here. Thus, while a conflict in the Circuits might technically exist, it is a conflict that should correct itself without intervention by this Court, and is not a basis for granting certiorari in this case pursuant to Rule 10.1(a) (conflicts among the Circuits).

Finally, even if this Court were to grant certiorari, repudiate *Copperweld*, and disagree with the Ninth Circuit's legal holdings regarding the "essential facility" and monopoly leveraging doctrines, the Petitioner in this case still would not be entitled to a reversal of the summary judgment granted against it because the undisputed material facts do not provide a basis for a trial. The undisputed

facts show that Northwest had access to SABRE, the alleged "essential facility," at all times. They also show that American did not use any alleged monopoly power in the market for providing CRS services to airlines to gain an advantage in the air transportation market, nor did it do anything else that was anticompetitive in the air transportation market. Thus, this case is fact bound, and not a proper vehicle for defining the scope of the "essential facility" and monopoly leveraging doctrines, if such further definition is required.

For these reasons, this Court should deny certiorari in this action and permit the orders of the trial court and the Ninth Circuit to become final.

ARGUMENT

I. THE DECISION BELOW IS COMPELLED BY THIS COURT'S OPINION IN *COPPERWELD*, AND IS CONSISTENT WITH ALL OTHER DECISIONS OF THIS COURT

This Court specifically addressed and unequivocally limited the scope of Section 2 in *Copperweld*. The Court stressed that Section 2 was substantially narrower in reach than the conspiracy provision, Section 1 (15 U.S.C. §1). 467 U.S. at 774-75. Capturing the essence of Section 2, the Court stated: "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization." 467 U.S. at 768.[12]

---

[12] Petitioner contends that *Copperweld* is a Section 1 conspiracy case and has no applicability to Section 2. That is not correct. In *Copperweld* the Court was called upon to decide whether the conduct of a parent company and its wholly-owned subsidiary was the conduct of a single entity (and thereby judged under Section 2) or the conduct of a conspiracy (and thereby judged under Section 1). By defining the differences between the two statutory provisions, the Court focused upon why the inquiry was so important. *See* 467 U.S. at 769 (the distinction between Section 1 and Section 2 was "*necessary* for a proper understanding of the terms 'contract, combination. . .or conspiracy' in §1") (emphasis added).

In defining the scope of Section 2, the Court in *Copperweld* observed that there could be single firm conduct that restrained trade, but would violate neither Section 1 nor Section 2. Still, the Court concluded that such a statutory scheme was "eminently sound":

> It cannot be denied that §1's focus on concerted behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. . . .An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to §1 liability. We have already noted that Congress left this "gap" for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote. . . .Moreover, whatever the wisdom of the distinction, the Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct. Had Congress intended to outlaw unreasonable restraints of trade as such, §1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of §2.

467 U.S. at 774-75.

Copperweld, of course, is the product of the language chosen by Congress to express its will. Section 2 provides: "Every person who shall *monopolize* or *attempt to monopolize*. . .shall be guilty of a felony." 15 U.S.C. §2 (emphasis added). The statute prohibits unilateral conduct that

threatens actual monopolization of a relevant market. At no place does Section 2 make it unlawful for a single firm to gain a competitive advantage. *See* P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶626.1 at p. 511 (1989 Supp.) ("[I]n any event, §2 is concerned with monopoly or the threat of it. Liability not connected with that concern has no place within this statute."). The act of seeking an advantage over competitors is the essence of competition—the goal the antitrust laws encourage. The antitrust laws protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

The analysis does not change when a firm lawfully possesses monopoly power in a relevant market. Section 2 prohibits *monopolization*—the *unlawful* acquisition or maintenance of monopoly power. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). *Lawfully* acquired and maintained monopoly power is an asset of the firm that has developed it pursuant to foresight, business acumen, and drive. That asset may be used to compete, so long as the firm does not engage in conduct that threatens the creation of an *unlawful* monopoly. *Olympia Equipment Leasing v. Western Union Telegraph Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987) ("[T]he lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors."); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 543-44 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) ("[T]he Sherman Act. . .does not render unlawful all monopolies. . . .A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits.").

Northwest conceded below that it could not show any support for a claim that American's conduct threatened unlawful monopolization of any relevant market. In the market for providing CRS services to airlines, Northwest claimed that American had monopoly power, but conceded that any such monopoly power was lawfully obtained as

a result of American's innovative development of SABRE. In the market for air transportation, the undisputed evidence showed that the industry was extremely competitive, that American's market share was less than 14%, and that American's low market share had been stable over time. Northwest conceded that there was no triable issue of fact regarding threatened monopolization of the air transportation market.[13]

There is no support in the decisions of this Court for the argument that the alleged use of lawfully acquired monopoly power to gain a mere competitive advantage is enough to violate Section 2. Petitioner's reliance on *United States v. Griffith*, 334 U.S. 100 (1948), is misplaced. This Court's holding in *Griffith* was that the defendants had "formed a conspiracy in violation of §§ 1 and 2 of the [Sherman] Act." 334 U.S. at 109. Thus, *Griffith* was a concerted action case and was decided under the antitrust principles applicable to such cases, not those applicable to single firm conduct. Ignoring *Griffith*'s holding, Petitioner cites to a single statement from the opinion: "[T]he use of monopoly power, however lawfully acquired,. . .to gain

---

[13] Petitioner complains that the trial court drew inferences and made factual assumptions from the market share information. After American presented market share and other information that tended to rebut any inference of threatened monopolization of the air transportation market, the burden was on Northwest to come forward with evidence that would support a jury finding to the contrary. Rule 56(c), Federal Rules of Civil Procedure. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Northwest came forward with nothing—not one shred of evidence showing any anticompetitive effect in the air transportation market. To the extent that the trial court relied purely upon market share information, it was because that was all that was before the trial court. Moreover, such reliance is perfectly proper. *Richter Concrete Corp v. Hill-Top Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 271 (7th Cir.), *cert. denied*, 455 U.S. 921 (1981) (30% market share insufficient to support attempt to monopolize claim); *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 672 F. Supp. 724 (S.D.N.Y. 1987), *aff'd*, 879 F.2d 1005 (2d Cir. 1989) (20% market share insufficient); *International Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987) (50% market share insufficient).

a competitive advantage. . .is unlawful." 334 U.S. at 107. But this isolated dicta cannot be reconciled with the later statement by this Court in *Copperweld*: "It is not enough that a single firm appears to 'restrain trade'." *Copperweld, supra*, 467 U.S. at 767. Thus, *Griffith*'s holding is consistent with *Copperweld* and with the holding of the courts below. The interpretation that Petitioner attempts to place upon a single statement from *Griffith*, taken out of context, is unreasonable, for it would render that statement inconsistent with this Court's decision in *Copperweld*.

Petitioner also relies upon *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). However, in *Otter Tail* the evidence established that the defendant had "*attempted to monopolize* and had *monopolized* the retail distribution of electric power in its service area" by refusing to provide certain towns access to its wholesale electric power facility. 410 U.S. at 368, 371, 377-79 (emphasis added). Thus, *Otter Tail*'s holding is consistent with *Copperweld* and with the holdings of the courts below. It rested on a finding of monopolization and attempted monopolization of the downstream market.

A. TO THE EXTENT THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING THE MONOPOLY LEVERAGING THEORY, THE VIEW OF THE NINTH CIRCUIT IS CORRECT AND REPRESENTS THE TREND AMONG THE CIRCUITS AFTER *COPPERWELD*

As discussed above, the trial court and the Ninth Circuit followed the teachings of *Copperweld* and the language of Section 2 exactly, and the results are clearly correct. Petitioner relies on the thirteen-year-old—and pre-*Copperweld*—decision of the Second Circuit in *Berkey* as the basis for claiming a conflict among the Circuits with respect to the theory of monopoly leveraging.[14] That conflict, to the

---

[14] Petitioner actually abandoned its monopoly leveraging claim in the trial court by failing to argue the theory in its papers and by express representation to the court. While Respondent's judicial estoppel ar-

extent it exists, is not sufficient to warrant certiorari in this case.

Berkey is clearly wrong, and is much criticized. *Ass'n for Intercollegiate Ath. for Women v. N.C.A.A.*, 735 F.2d 577, 586n.14 (D.C. Cir. 1984) (noting "the substantial academic criticism cast upon the leveraging concept," and citing R. Posner & F. Easterbrook, ANTITRUST, 802-10, 870-71 (2d ed. 1981); R. Bork, THE ANTITRUST PARADOX, 365-66, 372-75 (1978); Markovits, *Tie-ins, Leverage, and the American Antitrust Laws*, 80 YALE L.J. 195, 199-205 (1970); and Bowman, Jr., *Tying Arrangements and the Leveraging Problem*, 67 YALE L.J. 19, 21-29 (1957)). To some extent *Berkey* can do little harm, however, because it is fact bound. Significantly, *Berkey* did not hold that the defendant was liable under a theory of monopoly leveraging. The Second Circuit merely sent the case back with instructions to revisit the issue. In doing so, the Second Circuit also added many qualifying statements that substantially diluted the impact of the broader language about leveraging.

While it would not be wrong for this Court to affirm the Ninth Circuit and disapprove *Berkey*, American submits that it is unnecessary. Other courts have questioned *Berkey*[15] or have not followed it.[16] The Second Circuit has

---

gument was rejected by the Ninth Circuit (*Alaska Airlines, supra*, 948 F.2d at 539-40, 546 n.15 (Pet. App. at 5a-6a, 18a n.15)), Respondent continues to believe that its estoppel position has merit.

[15] The Eleventh and the Fourth Circuits have questioned *Berkey* without reaching the issue. *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1567-68 (11th Cir. 1990) ("...we harbour some reservations about the Second Circuit's conclusion that no attempt to monopolize the leveraged market need be provided..."); *Advanced Health-Care Services v. Radford Community Hospital*, 910 F.2d 139, 149 n.17 (4th Cir. 1990). Prior to rejecting *Berkey* outright, the Ninth Circuit also took this conservative, wait and see, approach. *See Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (it is "an elaborate fiction at best" that a firm "monopolizes" the market in which it has lawful monopoly power by using that power to gain an advantage in another market); *Syufy Enterprises v. American Multicinema*, 793 F.2d 990, 998 n.10 (9th Cir. 1986), *cert. denied*, 479 U.S.

itself characterized some of the related passages in *Berkey* as "dictum." *Twin Laboratories, Inc. v. Wieder Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990) (distinguishing *Berkey*).

As the courts have become more aware of this Court's pronouncement in *Copperweld*, they will inevitably reject *Berkey*. This process can be seen clearly in the Sixth Circuit. In *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub nom. G.K.C. Michigan Theatres, Inc. v. National Amusements, Inc.*, 490 U.S. 1087 (1989), the Sixth Circuit appeared to follow *Berkey* without reference to *Copperweld*.[17] However, in a more recent decision by the Sixth

---

1031 (1987). *See also Grason Electric Co. v. Sacramento Municipal Utility Dist.*, 571 F. Supp. 1504, 1517 (E.D. Cal 1983), *rev'd on other grounds*, 770 F.2d 883 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986). The D.C. Circuit has questioned *Berkey's* validity. *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984) (noting "the substantial academic criticism cast upon the leveraging concept"). Recently, the D.C. Circuit has addressed the leveraging question in a way that would be inconsistent with *Berkey*, although there was no mention of *Berkey* in the opinion. *United States v. Western Electric Co.*, 1990-1 Trade Cas. (CCH) ¶68,973 at p. 63,259-60 (D.C. Cir. 1990) (per curiam) ("[U]nless the entering [firm] will have the ability to raise prices or restrict output [i.e., monopoly power] in the market it seeks to enter, there can be no substantial possibility that it could use its monopoly power [in the other market] to 'impede competition.' ").

[16] *City of Chanute v. Williams Natural Gas Co.*, 743 F. Supp. 1437, 1461 (D.Kan. 1990) (projecting that the Tenth Circuit would not recognize monopoly leveraging as an independent Section 2 offense), *aff'd on other grounds*, ___ F.2d ___, 1992-1 Trade Cas. (CCH) ¶69,703 (10th Cir. 1992); *M&M Medical Supplies & Service v. Pleasant Valley Hospital*, 738 F.Supp. 1017, 1021 (S.D.W.Va. 1990) (leveraging claim must be treated as a claim for attempted monopolization).

[17] *Kerasotes* was not actually a leveraging case, and does not conflict with the decisions of the courts below. In *Kerasotes* the counterdefendants were charged with conspiring to monopolize and to attempt to monopolize the market for exhibiting first-run films in Flint, Michigan. Thus, *Kerasotes* not only involved concerted activity, but it also involved claims of actual monopolization or attempted monopolization of the downstream market, not a mere competitive advantage in that market.

Circuit where *Copperweld* was brought to the court's attention, the Sixth Circuit relied heavily upon the same language from *Copperweld* that was cited by the courts below in this case, and gave *Kerasotes* a narrow interpretation consistent with the teachings of *Copperweld*. *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1422-23, 1426-27 (1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 274 (1991). The process has corrected the situation in the Sixth Circuit without intervention by this Court.

Thus, there is no need to grant certiorari in this case because the decisions below were clearly correct, and any conflict among the Circuits is likely to resolve itself over time in light of the guidance provided by this Court in *Copperweld*. The courts are recognizing, as the Ninth Circuit has recognized, that the language of Section 2 compels proof of unlawful monopolization or attempted monopolization in at least one market to support a finding of liability. *See* Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108 (1959) ("[E]ven where a 'true' conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Court of Appeals.").

B. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE "ESSENTIAL FACILITY" DOCTRINE, AND THE VIEW OF THE NINTH CIRCUIT IS CORRECT

The opinions of the lower courts discussing the "essential facility" doctrine have used different types of language, but have all been decided consistent with *Copperweld* and the language of Section 2. The "essential facility" concept was coined in connection with fact situations where a firm or a group of firms controlled an asset that was "essential" to other firms that wished to compete.[18] By definition, if the asset was essential to one's

---

[18] The concept was first used in connection with boycotts organized by groups of competitors against outsiders. *See, e.g., United States v.*

ability to compete, denial of access to that asset would result in the monopolization of the relevant market by the firm or firms holding the asset. Thus, the concept of essentiality in the "essential facility" doctrine keeps the theory in accord with the language of Section 2 and the teachings of *Copperweld*.

For example, in *Hecht v. Pro-Football Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), the court noted that if access to a truly "essential" facility is denied, "all possible competition is by definition excluded." 570 F.2d at 993 n.45. In *Twin Laboratories, Inc. v. Wieder Health & Fitness, supra*, the Second Circuit held: "As the word 'essential' indicates, a plaintiff must show more than inconvenience or even some economic loss; he must show that an alternative to the facility is not feasible." 900 F.2d at 570. In *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 2041 (1991), plaintiff met its burden at the summary judgment stage by showing that denial of access to the defendant's railroad tracks could amount to actual monopolization of the relevant market for transporting newsprint because access was "essential" to the ability to compete in the newsprint shipping market. 902 F.2d at 176, 179.[19]

Terminal Railroad Association, 224 U.S. 383 (1912), and *Associated Press v. United States*, 326 U.S. 1 (1945). These cases involved concerted activity and therefore were judged under different principles than would be applied to single firm conduct. III P. Areeda & D. Turner, ANTITRUST LAW, ¶729 at p. 242-43 (1978); Areeda, *Essential Facilities: An Epithet In Need Of Limiting Principles*, 58 ANTITRUST L.J. 841, 844-45 (1990); Note, *The Legal and Regulatory Implications of Airline Computer Reservations Systems*, 103 Harv. L. Rev. 1930, 1938 (1990). A concerted action case expressly relied upon by Petitioner is *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (group of owners of Chicago Stadium conspired to monopolize market for professional basketball in Chicago by denying access to stadium).

[19] *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir. 1987), which is also relied upon by Petitioner, actually involved the affirmance of summary judgment for defendant on an "essential facility" claim where the court found that the simultaneous

The Seventh Circuit has distinguished between those occasions when denial of access to an allegedly "essential" facility eliminated competition and resulted in monopolization or threatened monopolization (*MCI Communications Co. v. AT&T*, 708 F.2d 1081, 1133 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)), and those where denial of access caused a competitive disadvantage (*Olympia Equipment Leasing v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987)). The Ninth Circuit expressly adopted the approach taken by the Seventh Circuit. *Alaska Airlines, supra*, 948 F.2d at 543-44 (Pet. App. at 12a-13a).

Thus, there is no conflict between the Ninth Circuit's holding below regarding the "essential facility" claim and the holdings of other courts. All have required proof that the denial of access to the "essential" asset would amount to the unlawful monopolization or attempted monopolization of the market in which that asset is used to compete. The conceded absence of any such threatened monopolization of the air transportation market was a valid basis for the rulings of the courts below.

II. EVEN UNDER PETITIONER'S INCORRECT INTERPRETATION OF SECTION 2, SUMMARY JUDGMENT FOR RESPONDENT WAS STILL THE APPROPRIATE OUTCOME ON THE FACTS OF THIS CASE

Even if the monopoly leveraging and "essential facility" doctrines were a basis for imposing antitrust liability independent of the words of Section 2 (which they are not), the undisputed material facts before the trial court nonetheless supported the entry of summary judgment for American.[20] Thus, any consideration of those overriding

---

delivery of yellow pages and white pages was extremely advantageous for the yellow pages publisher, but was not "essential" to the ability to compete in the publication of yellow pages directories. 833 F.2d at 612-13.

[20] The trial court arguably found that Petitioner was entitled to a trial of its monopoly leveraging claim but for the application of *Copperweld's* requirement that there be proof of threatened monopolization

legal issues presented by Petitioner would be academic in this case. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (review should be limited to those important legal issues that are "beyond the academic or the episodic").

A. SUMMARY JUDGMENT FOR AMERICAN SHOULD BE AFFIRMED BECAUSE THE UNDISPUTED FACTS SHOWED THAT AMERICAN DID NOT "USE" ITS ALLEGED CRS MONOPOLY POWER IN THE AIR TRANSPORTATION MARKET, AND DID NOT GAIN ANY UNWARRANTED COMPETITIVE ADVANTAGE IN THAT MARKET

To support the imposition of antitrust liability for monopoly leveraging under Petitioner's theory, the defendant must "use" the monopoly power it supposedly possesses in one market to gain an "unwarranted competitive advantage" in the other. *Berkey, supra*, 603 F.2d at 275. However, not all advantages gained by an alleged monopolist are the result of the use of monopoly power. Even *Berkey* recognized that there were advantages and benefits that might flow to an integrated firm for reasons separate from and independent of that firm's monopoly power. *Berkey, supra*, 603 F.2d at 276. *See also Catlin v. Washington Energy Co.*, supra, 791 F.2d at 1347.

The alleged "use" of CRS monopoly power by American is tied to two things: the use of airline preference in SABRE displays, and the charging of booking fees.

It is conceded that American used preference in ranking flights in SABRE displays prior to November of 1984. Was this use of preference a "use" of monopoly power? It could not have been. Every CRS, including those that were very

---

of the downstream market. *In re CRS, supra*, 694 F. Supp. at 1473-74 (Pet. App. at 72a-74a). However, given the court's holding, this discussion was dicta. American respectfully submits here, as it did in the Ninth Circuit, that the trial court's grant of summary judgment in favor of American would have been warranted even without reliance upon *Copperweld* because of Petitioner's failure to offer proof of the other elements of its monopoly leveraging claim.

small and which are not alleged to be "monopolists," gave the flights of their owners or partners some form of preference in their displays. *In re CRS, supra*, 694 F. Supp. at 1473 (Pet. App. at 72a) ("Display biasing can be accomplished by any firm which is vertically integrated in both the CRS and air transportation market. Biasing has been used since the inception of the CRS."). Nor was the use of preference done with an anticompetitive purpose—unless it is a violation of the antitrust laws to attempt to maximize one's sales as compared with those of one's competitors. *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 829 F.2d 1471, 1475 (9th Cir. 1987), *cert. denied*, ___ U.S. ___ , 109 S.Ct. 180 (1988) (a single firm's conduct does not violate Section 2 if it has any legitimate economic motive, even if the firm acts with the specific intent to maintain or increase its market share). Northwest's own witnesses conceded that the use of display preference was not wrong (ER 8:130; 16:186), and Northwest did not seek damages in the trial court for sales allegedly lost as a result of display preference. USAir Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' *In Limine* Motion to Exclude Section 2 Damage Claims (March 25, 1988) at 11, 13; Memorandum of Points and Authorities of the USAir Plaintiffs in Opposition to Defendant American's Motion for Summary Adjudication on the Issue of Antitrust Immunity (April 28, 1988) at 2.

Similarly, the charging of booking fees to Northwest could not constitute the "use" of monopoly power. The fees were always modest and were only assessed when a passenger actually made a booking and did not cancel prior to departure. *Alaska Airlines, supra*, 948 F.2d at 539 (Pet. App. at 3a-4a) ("The $1.75 fee to secure a booking is of little consequence because a $300 or $400 fare may otherwise be lost. . . .CRS fees are a relatively small part of the total costs incurred by a 'booked' airline when it provides air transportation to a paying passenger. . . ."). Moreover, SABRE's booking fees were the same as those charged by other CRSs, including PARS both prior to and after Northwest purchased an interest in it. All CRSs

charged booking fees for the simple reason that a CRS costs a great deal of money to develop and operate, and to give away its services would be folly.[21]

Finally, there was no evidence before the trial court that would warrant a trial on whether American's use of preference or its charging of a booking fee actually caused competitive injury in the air transportation market. Petitioner offered no evidence below of any unwarranted competitive effects in the air transportation market other than non-specific claims that American's CRS shifted revenues from other airlines to American. There was no showing that there was an actual effect on the competitive process. Even if it is presumed, in the absence of any evidence, that Northwest might have had more bookings if American's flights had not had preference in SABRE, and that perhaps Northwest would have been even more profitable if it did not have to pay booking fees, there was no evidence before the trial court that either thing had any effect on Northwest's ability to compete, or on competition in the marketplace in general. *See Twin Laboratories, Inc. v. Wieder Health & Fitness*, 900 F.2d 566 (2d Cir. 1990) (affirming summary judgment against plaintiff despite defendant's refusal to advertise plaintiff's products in defendant's magazines; even though plaintiff's expert claimed that plaintiff would have grown more had it been granted access to the magazines, the denial did

---

[21] Even if American had charged a "monopoly price" for access to SABRE, which it obviously did not because it charged the same rates as every other CRS, such conduct would not amount to the anticompetitive "use" of monopoly power. The charging of a high price—even a "monopoly price" charged by a lawful monopolist—is not an anticompetitive act. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987) ("[A]n excessive price alone does not establish a violation of the antitrust laws, because imposition of a high price is not, in and of itself, an anticompetitive act."). *See also Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986); *Continental Cablevision of Ohio, Inc. v. American Electric Power Co.*, 715 F.2d 1115, 1120 (6th cir. 1983). The charging of a high price can attract new entry and result in greater competition.

not keep plaintiff or others from competing). Thus, even under *Berkey*, summary judgment for American was proper.

B. SUMMARY JUDGMENT FOR AMERICAN SHOULD BE AFFIRMED BECAUSE THE UNDISPUTED FACTS SHOWED THAT AMERICAN NEVER DENIED NORTHWEST ACCESS TO SABRE, AND THAT SUCH ACCESS WAS NOT "ESSENTIAL"

Even under Petitioner's view of the "essential facility" theory, there must be proof of a denial of access to a facility that is essential to a firm's ability to compete in a downstream market. It is an undisputed fact that Northwest's flights, fares and seat availability were listed in SABRE from the day SABRE was first offered to travel agencies. *Alaska Airlines, supra*, 948 F.2d at 545 (Pet. App. at 16a) ("American [has] never refused any of the plaintiffs access"). There have been cases where the owner of an essential facility has set its prices so high as to amount to a practical denial of access. *See Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177-79 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2041 (1991); *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 665 F. Supp. 1493, 1534-35 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir. 1989). However, this is not such a case. The record before the trial court showed that American charged booking fees that were the same as those charged by other CRSs, and no airline, including Northwest, ever declined to participate in SABRE because of the booking fees. Thus, there is no evidence that access was denied.[22]

Moreover, the undisputed evidence also supports summary judgment for American on the ground that SABRE is not an "essential" facility. The record shows that there were always a number of ways in which an airline could sell its tickets, including at least three other CRSs. ER

---

[22] *See* L. Sullivan, Antitrust, at 117-18 and 126-27 (1977) (the price that the owner of an "essential facility" may charge may be a high price and may even include monopoly profits).

5:78-89; 26:243-44; 31:251; 32:252. SABRE accounted for only 26 percent of the reservations made on airlines. *Id.* One very successful airline, Southwest, never participated in any CRS. Thus, while SABRE might be "an excellent means of reaching potential customers," it was not essential. *See Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606, 612-13 (6th Cir. 1987). *See also In Re CRS, supra*, 694 F. Supp. at 1455 (Pet. App. at 38a).

III. PETITIONER'S CHALLENGES ARE FACT BOUND, AND WERE NOT ASSERTED IN THE COURTS BELOW

Petitioner charges that the courts below improperly resolved fact issues on the basis of economic theory at the summary judgment stage. Pet. at pp. 16-20. These new claims, raised for the first time in this Court, are misrepresented and do not provide a basis for granting certiorari. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

The material facts were not disputed below. Petitioner *conceded* that there was insufficient evidence to support a finding that American had unlawfully monopolized or attempted to monopolize the market for the provision of CRS services to airlines. Petitioner also *conceded* that there was insufficient evidence to support a finding of unlawful monopolization or attempted monopolization of the air transportation market. These were the material facts that must draw any court to conclude that there was insufficient evidence to support a finding that Section 2 had been violated.

The fact issues raised by Petitioner in this Court are not only not material, they are raised in this Court for the first time contrary to established prohibitions. *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no occasion to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals."). Petitioner seeks to characterize the problem

as one that occurred in the Court of Appeals, and thereby tries to justify its delay in raising these issues. However, the factual record was established in the trial court, and the Court of Appeals merely affirmed that the trial court had acted properly. The failure to object in the Ninth Circuit to the trial court's findings as to the undisputed material facts precludes Petitioner from raising such claims now.[23] *Steagald v. United States,* 451 U.S. 204, 209 (1981) (the right to raise factual issues before the Supreme Court may be lost "when [a party] has acquiesced in contrary findings by [the courts below]").

These supposed fact issues are also bogus. For example, there was no evidence of any "price squeeze" resulting from onerous booking fees. American's booking fees were no higher than those charged by every other CRS (including the CRS partially owned by Petitioner). Moreover, the undisputed facts established that those booking fees were too modest to put any airline into a "squeeze." *Alaska Airlines, supra,* 948 F.2d at 539 (Pet. App. at 3a-4a) ("The $1.75 fee to secure a booking is of little consequence because a $300 or $400 fare may otherwise be lost. . . .CRS fees are a relatively small part of the total costs incurred by a 'booked' airline when it provides air transportation to a paying passenger. . . .").

The citation to air transportation market share data in the opinions of the lower courts is not unusual. Market share data can be used to assess market power in the context of Section 2. *See* footnote 13, *supra*. American offered the market share data to rebut any inference that American's conduct had threatened unlawful monopolization of the air transportation market. At that time the burden shifted to Petitioner to come forward with admis-

[23] Moreover, there was no error committed by the trial court. The court issued a detailed opinion that showed a careful consideration of the entire record, and properly looked at the undisputed material facts "in a light most favorable to the plaintiffs." *In re CRS, supra,* 694 F. Supp. at 1465 (Pet. App. at 25a) ("Looking at the facts in a light most favorable to the plaintiffs, American's conduct may restrain trade, but it does not threaten monopolization.").

sible evidence that would at least create a jury question on the issue of monopolization.[24] Rule 56(c), Federal Rules of Civil Procedure. Petitioner chose not to offer any evidence of competitive impact in the downstream air transportation market. Indeed, Petitioner conceded that monopolization of the air transportation market was not threatened. Thus, the lower courts' citation to the market share data was justified, and did not involve any improper "fact-finding."[25]

CONCLUSION

For the reasons set forth above, this case, which was correctly decided below, does not raise issues that are proper for review on a petition for certiorari.

Dated: March 16, 1992

Respectfully submitted,

ROBERT E. COOPER*
J. EDD STEPP, JR.
STEVEN C. MCCRACKEN
MARK E. WEBER
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000
Attorneys for Respondent
AMERICAN AIRLINES, INC.

*Counsel of Record